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## The Neutrality Act of 1937

BY RAYMOND LESLIE BUELL

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# The Neutrality Act of 1937

BY RAYMOND LESLIE BUELL

*with the aid of the Research Staff of the Foreign Policy Association*

In view of the Far Eastern situation, critical attention is focused on the Neutrality Act of May 1, 1937. On the outbreak of war, an arms and loan embargo presumably is "mandatory." But developments indicate that the President has wide discretion in determining whether a "state of war" exists. Moreover, the Act does not prevent American industries from establishing branch factories abroad for the purpose of manufacturing munitions, or raising funds in the American market in time of war to finance munition production in neutral countries.

The provisions authorizing the President to prohibit American vessels from carrying articles to belligerents, and to provide that exports generally should be permitted only after American title has been divested, gives the Chief Executive vast discretion, possibly including the right to discriminate against the aggressor. The Neutrality Act appears

to conflict with certain treaty obligations of the United States, such as the Havana convention of February 1928; and in imposing a penalty on a state victim of aggression, as well as the aggressor, it may violate by implication the obligations of certain other treaties.

While the Act removes certain types of dispute which arose between the United States and the belligerents during the World War, its unilateral application involves certain new dangers for the United States. Critics assert that its application may undermine both the Open Door policy and the Monroe Doctrine, and in effect make the United States an ally of Britain and Japan. It is possible, however, within certain limits to reconcile the application of the Neutrality Act with certain forms of consultation, but the arms and financial provisions obstruct the State Department in adopting a war prevention policy.

WITH the outbreak of widespread hostilities in the Orient, controversy has arisen within the United States as to whether the provisions of existing "neutrality" legislation should be applied. This study of the history and provisions of the legislation may throw light upon a type of controversy which may recur in the event of hostilities in other parts of the world.

Since 1935 Congress has enacted three neutrality laws:

1. The joint resolution of August 31, 1935—in force until February 29, 1936—which provided for an embargo on the export of implements of war "upon the outbreak or during the progress of war," and gave the President discretion to prohibit Americans from traveling on belligerent vessels except at their own risk.<sup>1</sup>

2. The joint resolution of February 29, 1936, which amended and extended the resolution of August 31,

1. Cf. R. L. Buell, "The New American Neutrality," *Foreign Policy Reports*, January 15, 1936. This resolution also established a National Munitions Board to register munitions plants and grant licenses in the case of munitions exports.

1935 until May 1, 1937. This resolution reduced the discretion of the President relative to the imposition of the arms embargo;<sup>2</sup> added an embargo on loans to belligerents and exempted the American republics from the operation of the Act.

3. The joint resolution of May 1, 1937, designed to be permanent, except for the cash-and-carry provisions which expire at the end of two years. The provisions of this resolution will be analyzed in a later section of this report.

This series of laws represents a compromise between a number of "neutrality" schools: (1) the so-

2. The 1935 resolution provided that "upon the outbreak or during the progress of War" the President could impose the arms embargo; the new resolution provided that the embargo should enter into effect "whenever the President finds that there exists a state of war. . . ." The 1935 resolution also provided that: "The President may, from time to time, by proclamation, extend" the arms embargo "to other states as and when they may become involved in such war." The 1936 resolution states that the President "shall" extend the embargo under these circumstances. Both changes remain in the 1937 resolution. Cf. R. L. Buell, "American Neutrality and Collective Security," *Geneva Special Studies*, Vol. VI, No. 6, 1935, p. 14.

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called "mandatory" school, which favors automatic embargoes on the export of munitions and war materials to all belligerents on the outbreak of war; (2) the "discretionary" school, which believes the President should have power to impose embargoes at his discretion, including the power to discriminate against an aggressor; and (3) the pre-war neutrality school, which believes in enforcing traditional rights of belligerent trade.

Although President Roosevelt applied the arms embargo against both Italy and Ethiopia, he had no authority under the 1935 law to embargo the export of war materials, such as oil.<sup>3</sup>

In January 1936 the administration supported legislation which would have authorized the President to prohibit the export of war materials, in addition to implements of war, in excess of "normal quotas," provided no restrictions of any kind were imposed on food, clothing or medical supplies,<sup>4</sup> and that no discrimination was made against any belligerent, unless with the express authority of Congress.

Although the Committee on Foreign Affairs reported this bill to the House on January 28, it met severe opposition within the Senate Committee on Foreign Relations,<sup>5</sup> particularly from those who believed in the "freedom of the seas" and opposed even indirect cooperation with the League of Nations. Moreover, a number of Italo-Americans vigorously opposed any legislation which would adversely affect Italy's campaign in Ethiopia.<sup>6</sup>

Believing that time was too short to reconcile fundamental differences—for the 1935 resolution would expire on February 29, 1936—Senator Thomas of Utah suggested that the existing reso-

lution be merely extended for one year.<sup>7</sup> On February 12 Senator Pittman reported out a proposal which extended the 1935 resolution for fourteen months, or until May 1, 1937, with amendments described above.<sup>8</sup> A similar resolution was introduced on February 17 into the House and, after forty minutes of debate under suspension of the rules, was adopted on the same day by a vote of 353 to 27.<sup>9</sup> A few progressive Congressmen denounced this "gag-rule" procedure and demanded "real" neutrality legislation.<sup>10</sup>

In the Senate a group of sixteen voted for the Clark amendment prolonging the proposed resolution only three months, with a view to framing permanent legislation before adjournment of Congress. In support of his amendment, Senator Clark said: "Certainly, with the war clouds darkening the sky in many parts of the world, there will never be a greater necessity for a permanent neutrality policy than there is today."<sup>11</sup> But the Senate as a whole apparently believed such legislation could not be enacted even before June 1 and, after rejecting the Bone amendment authorizing the President to warn Americans to trade with belligerents only at their own risk, and the Pope amendment authorizing him to impose normal quotas in raw materials, this body adopted the House Resolution on February 18.<sup>12</sup> Thus the second "temporary" neutrality law was adopted.

When Congress convened in January 1937 it was confronted by the President's urgent request for authority to impose an arms embargo on Spain, where civil war was raging—a request which was promptly granted in the form of a joint resolution applicable to the special case of Spain.<sup>13</sup> Meanwhile, both the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs began to consider new legislation to replace the neutrality resolution which would expire on May 1; members hoped that at this time a permanent neutrality statute could be adopted. At the end of February these committees reported bills to their respective houses and debate began at once.

3. Cf. Buell, "The New American Neutrality," cited.

4. Cf. S. 3474, H.J.Res. 422; cf. also the President's message to Congress, *Congressional Record*, January 3, 1936, p. 10.

5. *Congressional Record*, January 28, 1936, p. 1166.

6. Cf. the brief of Judge Salvatore Cotillo, "Neutrality," *Hearings before the Committee on Foreign Relations*, U. S. Senate, 74th Congress, 2nd session, on S. 3474, p. 259; also testimony of Peter L. Sabbatino, Frank Leveroni, A. A. Cessassa, Francis A. Pallotti, E. V. Alessandroni, and Dr. F. J. Rossi. "American Neutrality Policy," *Hearings before the Committee on Foreign Affairs*, House of Representatives, 74th Congress, 2nd session, on H.J.Res. 422, *ibid.* The original administration bill, introduced in 1936, contained a provision (section 16) which declared, "except to the extent that the law and rules of neutrality are or may be temporarily or provisionally modified by or under authority of this act, the United States reserves and reaffirms rights under international law as it existed prior to August 1, 1914." In an effort to conciliate the pre-war neutrality school, Secretary Hull, when appearing before the Senate Foreign Relations Committee, suggested that the phrase simply read, "Provided, that the United States reserves and reaffirms its rights under international law as it existed prior to August 1, 1914" and be moved into a more prominent position—section 9. *Senate Hearings*, cited, p. 62. But this did not have the intended effect, and Congress did not adopt the phrase.

7. *Senate Hearings*, p. 283; also S.J.Res. 198, *Congressional Record*, January 16, 1936, p. 468, and Senator Thomas' address, *ibid.*, February 17, 1936, p. 2242.

8. Senate Report 1557, *Congressional Record*, February 12, 1936, p. 1918; also H.J.Res. 482, introduced by Mr. Kloebe, *ibid.*, February 5, 1936, p. 1576; also H.R. 2001, February 14, 1936, *ibid.*, p. 2173, on H.J.Res. 491.

9. *Congressional Record*, February 17, 1936, p. 2306.

10. *Ibid.*, p. 2297; also Mr. Maverick, *ibid.*, p. 2293.

11. *Ibid.*, February 18, 1936, pp. 2343, 2344, 2348.

12. *Ibid.*, p. 2363.

13. This question is discussed in a forthcoming issue of *Foreign Policy Reports*, dealing with American policy toward the Spanish civil war.

Unlike the 1935 and 1936 neutrality debates, that of 1937 was thorough and extensive. There was little disagreement over the question of imposing an embargo on arms and loans to aid belligerents, but sharp divergence concerning the policy to be followed toward the export of other materials, and the protection of American ships and materials on the high seas.

Although on the floor of both houses members continued to demand an embargo on certain raw materials, the "mandatory embargo" school had manifestly weakened by 1937.<sup>14</sup> The eclipse of this school was apparently caused by reluctance to pay the economic price involved in sweeping embargoes and by fear of playing into the hands of self-sufficient dictatorships which would not be adversely affected by American embargoes, in contrast to Britain and France.

The leading issue in the debate was that of "cash and carry." The mandatory group<sup>15</sup> asked that as soon as the President issued his neutrality proclamation, exports be permitted to leave American shores only after Americans had divested themselves of all title and interest, and that American ships be automatically forbidden to carry any goods designated by the President. Under these provisions, the foreign trade of the United States with belligerents might continue except in the case of implements of war, provided the belligerents transported American goods in their own vessels and paid cash for them. Thus the United States would not be responsible for the fate of such goods or vessels on the high seas or in war zones.

While the majority of Congress favored cash-and-carry as an experiment, they were unwilling to make its application automatic on the outbreak of any war—apparently in the belief that many wars would not be serious enough to justify the imposition of severe restrictions on the American merchant marine and foreign trade generally. Administration leaders, supported by the majority, favored giving the President discretion in these matters. The mandatory school—which included the Senators who had taken the lead in the Munitions Inquiry—contended, however, that if the President enjoyed discretion regarding cash-and-carry, he would be virtually granted power to de-

clare war. For example, if he failed to apply cash-and-carry at the beginning of a war, but did so after it had been in existence several months, undoubtedly one belligerent would be injured more severely than another and would charge the President with being unneutral. This difficulty would supposedly be avoided if the world were notified in advance that the cash-and-carry provisions automatically went into effect at the outbreak of any war.<sup>16</sup>

The principle of cash-and-carry, whether mandatory or discretionary, was strongly attacked by a few Senators and Congressmen on the ground that refusal to protect American interests on the high seas would bring the war nearer American shores, and that such a policy would sacrifice the economic interests of the United States, particularly the merchant marine.<sup>17</sup>

On March 3, 1937 the Senate, by a vote of 63 to 6, passed the resolution introduced by Senator Pittman, chairman of the Senate Committee. On March 18 the House passed the bill introduced by Judge McReynolds, chairman of the House Committee, by a vote of 376 to 12.<sup>18-19</sup> Differing in a number of respects, the House and Senate bills were referred to conference immediately after their passage, and it was only on April 28 that a compromise measure was reported back<sup>20</sup> and adopted the next day. The measure represented a partial victory for the House discretionary view; but Congress had so many misgivings as to the

14. The State Department no longer supported "normal quotas," apparently because of the difficulty of administration; and on March 18 the House defeated the Coffee "normal quota" amendment by 81 to 24. *Congressional Record*, March 18, 1937, p. 3084.

15. In S.J.Res. 60, Senators Clark, Bone, Vandenberg and Nye merely proposed to apply cash-and-carry to articles exported through "a war zone"; but later they came out for a wider form of mandatory cash-and-carry. Cf. S. 2370.

16. Cf. speech of Senator Vandenberg, *Congressional Record*, April 29, 1937, p. 5150; also remarks of Senators Clark, Nye, and Bone, *ibid.*, pp. 2176, 3437, and 5167. Cf. also Prof. John Bassett Moore's letter to Congressman Fish, *New York Times*, February 18, 1937. The Pittman bill, reported to the Senate on February 23, 1937, gave the President discretion to decide when to prohibit American ships from carrying designated articles to belligerents, but provided that the divesting of title in exports should be automatic. This discretion in regard to American shipping was opposed by Senator Vandenberg whose amendment to strike out the clause was rejected by a vote of 48 to 24. The Senate also declined to accept the Borah amendment giving the President the same discretion over vesting title as over American shipping. *Congressional Record*, March 1, 1937, p. 2096; March 3, 1937, pp. 2254, 2255. The House rejected an amendment by 69 to 41 making cash-and-carry mandatory. *Ibid.*, March 18, 1937, p. 3082.

17. Cf. Senators Gerry, Borah, Johnson, Martin (Colorado), and Shanley (Connecticut). *Congressional Record*, pp. 1978, 1939, 2101, 2103, 2106, 2234, 2240, 2259, 2958, 5176. Also Republican minority of the House Committee on Foreign Affairs, House Report 320, 75th Congress, 1st session.

18-19. *Congressional Record*, March 3, 1937, p. 2260; Austin, Borah, Bridges, Gerry, Johnson (California), and Lodge in the negative. *Ibid.*, March 18, 1937, p. 3094. Cf. also, Senate Report No. 118, on S.J.Res. 5, 75th Congress, 1st session; House Report 320, on H.J.Res. 242, 75th Congress, 1st session.

20. *Conference Report* (to accompany S.J.Res. 51), Conference Committee Print, April 28, 1937. House of Representatives, 75th Congress, 1st session.



wisdom of the cash-and-carry principle that, at the suggestion of Congressman Shanley of Connecticut, it fixed at two years the life of the provision authorizing the President to prohibit American vessels from carrying designated articles and to compel the divesting of American title to exports.<sup>21</sup>

The fervid support of "neutrality" legislation, as an escape from the danger of involvement in war, exhibited by Congress in the summer of 1935 had considerably subsided in 1937. Congressman after Congressman now declared that the belief that legislation could keep the country out of war was illusory. Thus the late Senator Robinson remarked: "There is no way in which by law we can make it impossible for our people to be drawn into war;" while Judge McReynolds, chairman of the House Committee on Foreign Affairs, declared: "No legislation can keep us out of war."<sup>22</sup>

Other members of Congress were troubled by the general philosophy of the bill—namely that the United States should renounce many of its rights under international law when these were violated, and fail to assume any responsibility for cooperating to avert war.<sup>23</sup> Perhaps the most forceful statement along these lines was made by Congressman Eaton of New Jersey, who said: "We propose to lock our doors and turn our backs upon the distracted world and refuse to face the moral obligations that inhere in our supreme greatness, that inhere in our widespread knowledge, that inhere in our enormous wealth and in our free institutions. From a world, whose wounds we could heal, we propose to shut ourselves away, neutralized, sterilized spiritually and morally. This legislation is a symptom of a moral sterilization of the American people in connection with our tremendous inescapable obligations to the rest of the

world. I am worried by this attitude. I am bowed down and distressed by it."<sup>24</sup>

Congressmen expressing this view remained in a very small minority.<sup>25</sup> While many were skeptical concerning the effectiveness of the "neutrality" policy, they declared that the country demanded its adoption. Most of them, no doubt, feared that the very effort to avert war by stopping aggression might hasten America's participation in a world conflict. They believed that the present legislation, whatever its defects, would remove some of the "involvements" which had led to the entrance of the United States into the World War. Generally, they wished peace at any price—except possibly the price of invasion.

#### THE 1937 NEUTRALITY ACT

With this brief review of the history of neutrality legislation, we turn to an analysis of the present Act. When the President finds that a "state of war" exists between two or more foreign states, he shall issue a proclamation to this effect. As a result, the following acts are automatically prohibited:<sup>26</sup>

1. Export of "arms, ammunition and implements of war" to belligerents.
2. Purchase or sale of securities or other obligations of belligerents.
3. Solicitation of war contributions.
4. Transport of implements of war in American vessels to belligerents.
5. Travel by Americans on belligerent vessels.
6. Arming of American merchantmen.

In addition, the President has authority, in his discretion, to prohibit:

1. Transport of any article or commodity on an American vessel to a belligerent state.
2. Export of any goods to a belligerent until after "all right, title, and interest" has been transferred to a foreign government or representative.
3. Use of American ports as a basis of supply for belligerent warships.
4. Use of such ports by foreign submarines and armed merchant ships except in accordance with regulations.<sup>27</sup>

#### THE ARMS EMBARGO

Under the Joint Resolution of May 1, 1937, an arms embargo must be imposed whenever the

21. *Congressional Record*, March 18, 1937, p. 3072; also Section 2(c) Joint Resolution of May 1, 1937. This resolution technically is an amendment to the Joint Resolution of August 31, 1935; as amended in 1936. The Munitions Committee Senators, who had voted for the original Senate bill, declined to accept the conference report because of its discretionary features. The 15 to vote against the report were Bone, Bridges, Capper, Clark, Copeland, Frazier, Gerry, Hale, Holt, Johnson (California), Lodge, Nye, Steiwer, Townsend and White. 41 voted in favor. *Ibid.*; April 29, 1937, p. 5168. The House accepted the conference report without an aye or nay vote. *Ibid.*, p. 5182.

22. *Ibid.*, March 12, p. 2769, April 29, p. 5152. Cf. also Senator Schwellenbach, March 1, 1937, p. 2105; Senator Davis, March 13, 1937, p. 2259; Senator Connally, April 29, 1937, p. 5153; Mr. Voorhis, March 16, 1937, p. 2949; Mr. Klobb, March 12, 1937, p. 2783; Mr. Johnson (Texas), April 29, 1937, p. 5180; Mr. Fish, March 12, 1937, p. 2779.

23. Apparently realizing that the Joint Resolution could hardly be called "neutrality," the Senate bill proposed to cite the resolution as the "Peace Act of 1937." The House bill wished to cite it as the "Neutrality Act of 1937," but the conference report dropped both phrases. Cf. *Congressional Record*, March 3, 1937, p. 2259.

24. *Ibid.*, March 12, 1937, p. 2786. Cf. Mr. Gifford's remark: "But I do not want my country to be plain yellow." *Ibid.*, March 18, p. 3067.

25. Cf. H.J.Res. 269, introduced by Congressman Fish, to call a conference of all the signatories of the Briand-Kellogg Peace Pact.

26. Exceptions are made to many of these prohibitions. Cf. p. 171.

27. Cf. Sections 7 and 8.

President finds that (1) "there exists a state of war between, or among, two or more foreign states"; (2) a "state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign state would threaten or endanger the peace of the United States." If the President finds that either of these circumstances exists, he shall issue a proclamation stating this fact—which will be known as the neutrality proclamation—and thereafter it will be illegal to export implements of war "to any belligerent state named in such proclamation, or to any neutral state for transshipment to, or for the use of, any such belligerent state." Moreover, the President shall extend the embargo by proclamation "to other states as and when they may become involved in such war."

Under this provision it is not possible for the President to make a distinction between an aggressor and a victim of aggression, or between government and rebel forces in the event of civil strife. Moreover, should League states apply military sanctions against an aggressor, the President must extend the embargo to them if he believes that the imposition of these sanctions has resulted in a state of war.<sup>28</sup>

There is nothing in the Act to prevent American industries from establishing branch factories abroad for the purpose of manufacturing munitions, or from raising funds in the American market in time of war to finance such production if carried on in neutral countries. The result of this Act, in the event of a war involving the British Empire, may therefore be merely to transfer the munitions industry from the United States to Canada, particularly in view of the exception authorized with respect to trade across the border.<sup>29</sup>

28. For the administration of the arms control features of the Act, cf. *First Annual Report of National Munitions Control Board* for the year ending November 30, 1936, 75th Congress, 1st session, House Document No. 10. The case of the *United States vs. Curtiss-Wright Export Corporation*, upholding wide discretion on the part of the President in the field of foreign affairs, arose out of the illegal export of planes in violation of the Chaco Arms Resolution of May 28, 1934. For text of decision, cf. *American Journal of International Law*, April 1937, p. 334.

29. "It is impossible to measure by commercial transactions, or by the number of manufacturers in the U.S.A. who made munitions materials, the great service that country rendered to Canada and through it to the British Empire and the Allies in the Great War . . . Those who had actually to deal with the Americans know the fine type of men who stepped in at great risk and supplied machinery, tools, gauges, as well as materials, in 1914, which made it possible for Canada to render help to the mother country." Cf. Col. David Carnegie, *The History of Munitions Supply to Canada, 1914-1918* (New York, Longmans Green, 1925), p. 215.

From Britain's point of view, Canadian neutrality might prove advantageous if Canada could borrow money from the United States and American branch factories could continue to manufacture planes and other munitions for shipment to Britain.<sup>30</sup>

#### THE LOAN EMBARGO

Whenever the President shall have issued a proclamation declaring that a state of war or civil strife endangering the peace of the United States exists, "it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any belligerent state wherein civil strife exists, or of any person acting for or on behalf of any faction or asserted government within any such state wherein civil strife exists, issued after the date of such proclamation, or to make any loan or extend any credit to any such government, political subdivision, faction, asserted government or person, or to solicit or receive any contribution for any such government, political subdivision, faction, asserted government, or person . . ."<sup>31</sup> Under this section, once the President's proclamation has been issued, transactions in any security issued after the proclamation on behalf of a belligerent government become illegal; and the making of any loan or the extension of any credit for such a purpose, or the solicitation of war contributions is also prohibited.

These prohibitions are mitigated, however, by two important exceptions. First, they do "not apply to a renewal or adjustment of such indebtedness as may exist on the date of the President's proclamation." Second, the President, in his dis-

30. Senator Thomas of Utah is of the opinion that Canada may be regarded as an "American Republic" under the Act of Westminster. Cf. American Society of International Law, *Proceedings*, April 25, 1936. Even if this interpretation is correct, Canada could not profit from the exceptions granted in section 4 of the Act if engaged in a war to which Britain, a non-American power, was a party. Cf. p. 213. In April 1937 the Canadian Parliament amended the Customs Act by authorizing the government to prohibit or control the import or export of arms, ammunition, implements of war, or any articles deemed useful in the production of such munitions; the government may also prohibit the export of any "victual which may be used as food by man or beast"; and may provide for the registration or licensing of munition manufacture. On July 30, 1937 the government issued an Order in Council prohibiting the export to Spain of seven categories of munitions as defined by the United States. *The Canada Gazette*, Extra, July 31, 1937.

31. Nothing in the Act, however, prohibits the collection of funds to be used for medical aid and assistance, or for food and clothing to relieve human suffering, when made "on behalf of and for use by any person or organization, which is not acting for or on behalf of any such government," but all such solicitations shall be subject to regulations prescribed by the President. This section of the Act is discussed in a forthcoming *Foreign Policy Report*.

cretion, may "except from the operation of this section ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peacetime commercial transactions" if he believes such exemptions will serve to protect commercial or other interests of the United States.

The President may not authorize the extension of credits to finance the munitions trade, since this is illegal during war; but he may authorize credits to finance the export of raw materials, which remains legal. What constitutes ordinary commercial credits apparently is for the President to determine, subject to the courts. The Export-Import Bank of the United States has extended such credits for a term of five years. Under this clause, the President could legally follow the course adopted in October 1914 when President Wilson ruled that granting bank credits did not violate the admonition against foreign lending proclaimed in August 1914.<sup>32</sup>

Moreover, under this law it remains possible for a belligerent to purchase materials in the American market with gold or silver, with exchange acquired from exports to the United States or third countries, or with proceeds obtained from the sale of foreign securities issued prior to the date of the President's proclamation, provided they enjoyed a market in the United States. Nothing in the Act would seem to prevent a belligerent from expropriating American securities held by its nationals, or from acquiring similar securities or credit balances in the United States held by a third state. In other words State A, being a belligerent, might borrow a credit balance held by State B, a neutral, in the United States. Thus it may be concluded that belligerents with financial resources will be able to find means of financing a wartime trade with the United States.<sup>33</sup>

32. Senate Report 944, Part 5, 74th Congress, 2nd Session, p. 60. Under the Johnson Act of April 13, 1934, the purchase or sale of any obligations of any foreign government, issued after the passage of the Act, is prohibited so long as such government is in default in the payment of its obligations to the government of the United States. While this law excepts a renewal or adjustment of existing indebtedness, it does not contain the general exception as to ordinary commercial credits. Consequently, in the event a government in default to the United States becomes a belligerent it could not presumably profit from the exception in the neutrality resolution of May 1, 1937.

33. Cf. p. 175, for the British and French holdings in this country. Cf. Ernest K. Lindley, "Can \$8,000,000,000 Stay Neutral?" *Saturday Evening Post*, February 13, 1937. To prevent the development of a war trade financed by such investments, the United States might impound belligerent balances here. Such action would involve constitutional difficulties, at the same time inviting retaliation against American investments abroad. To be effective, any policy of sequestration would probably have to impound the balances of neutrals as well as belligerents, which would seriously injure American foreign trade.

#### THE CASH-AND-CARRY PROGRAM

While the Neutrality Act does not authorize complete embargoes on any articles except implements of war, it does endeavor to reduce the number of disputes arising out of the export to belligerents of contraband, such as cotton and oil, by a number of provisions, roughly called cash-and-carry.<sup>34</sup>

(1) American citizens are forbidden to travel on belligerent ships "except in accordance with such rules and regulations as the President shall prescribe" (Section 9a).

(2) American vessels are forbidden to become armed merchantmen, being allowed to carry only "small arms and ammunition," which the President may deem necessary for the preservation of discipline (Section 10).

(3) The President is authorized, at his discretion, to prohibit American vessels, including aircraft, from carrying articles designated by him to belligerent states, and to allow exports generally to leave American ports only after American title to such articles has been divested.<sup>35</sup> This last power expires on May 1, 1939, when Congress will review the policy. The theory of this Act is that American vessels and American citizens should keep out of war zones and not involve their government in the type of disputes which arose between 1914 and 1917.

The prohibition against American travel on belligerent vessels goes further than the resolution of August 1935 which merely authorized the President to withhold protection from citizens traveling on such vessels. The prohibition imposed in the present law, however, does not apply to an American citizen who had begun a voyage in advance of the date of the President's proclamation and could not discontinue it after that date, nor does the prohibition apply until 90 days after the issuance of the proclamation to any citizen returning from abroad. The purpose of this exemption is apparently to facilitate the return of American citizens living in war zones. Moreover, the President is given the right to make exceptions to this prohibition. This right was granted to enable newspaper correspondents and others to make use of belligerent vessels. But the language would appear

34. The present resolution expressly states that the phrase "arms, ammunition, and implements of war" shall not include raw materials, thus removing the possibility that the President might interpret his power to embargo implements of war to include articles such as cotton and oil.

35. The Senate Munitions Committee expressed the belief that American insistence on the right to arm merchantmen during the World War "worked indirectly, not only to make inevitable Germany's recourse to submarine warfare but also, actually, to encourage it." Senate Report No. 994, part 5, p. 39. Cf. also Senator Pittman's remarks, *Congressional Record*, p. 2091. The term "American vessel" is defined to include aircraft. Cf. paragraph d of Section 13.

broad enough to justify the President in making sweeping exemptions.<sup>36</sup>

On the other hand, the Act does not attempt to control the movements of American vessels, except by prohibiting them from carrying munitions and other articles designated by the President, nor does it authorize the President to prevent American citizens from traveling on either American or neutral vessels. Thus Americans may legally travel to a belligerent port on a neutral ship carrying a cargo of cotton or petroleum; should belligerent aircraft or submarines sink the ship, American lives might be lost.

According to Senator Pittman, the United States government intends that American vessels leaving our ports will be marked so that belligerents may be certain they are not carrying munitions or even contraband.<sup>37</sup> The Senator declared:

"In the event of another war, we having provided that our merchant vessels shall not be armed while engaged in commerce with belligerents, and that notice shall be given to all belligerents that our ships are ordered to stop and yield peacefully to visit and search, and our ships being identified not by a flag, which may be misused, but by markings on the side of each of our vessels as it leaves port. I believe that no submarine will ever again sink an American ship in such circumstances. If that be the case, there would be no necessity for restraining our ships from carrying anything they wanted to carry."<sup>38</sup>

As this statement indicates, the cash-and-carry provision of the Act appears to constitute a victory for those who believe that the United States became involved in the World War because of the German submarine policy rather than war profits. The resolution does not directly interfere with such profits, except in the case of munitions. As Senator Borah declared: "We seek to avoid all risks, all danger, but we make certain to get all the profits."<sup>39</sup> The law attempts to transfer the risks from the American to the foreigner, and thus reduce, if not entirely remove, the type of "involvement" which supposedly drew the United States into the World War.

In applying these cash-and-carry provisions, the President is given four types of discretion:

(1) To decide when to put into effect the provisions prohibiting American vessels from carrying designated

articles and requiring the divesting of title in goods shipped abroad.<sup>40</sup>

(2) To make "limitations and exceptions" as to "lakes, rivers, and inland waters bordering on the United States," and as to "transportation on or over lands bordering on the United States."

(3) To select the articles or commodities which American ships may not carry.

(4) To "change, modify, or revoke in whole or in part any proclamations issued" under the section.

The existence of these wide powers will enable the President to bring pressure upon belligerents who otherwise might be unwilling to respect the interests of the United States.<sup>41</sup> They also enable him, indirectly at least, to favor one belligerent rather than another. The exception in regard to trade over the borders of the United States originated in a desire to protect ordinary trade, by land and coastwise, between the United States and Canada which would not be in any danger of attack.<sup>42</sup> But the language seems broad enough to allow unlimited trade in war materials (except implements of war) between the United States and Canada and the transshipment of such materials to Britain. The power to select articles which American ships may not carry may also operate against one belligerent dependent to a greater extent than another on trade in embargoed articles. According to Senator Pittman, the power of the President to change, in whole or in part, any proclamation does not authorize the President to lift the cash-and-carry provision, except against an aggressor.<sup>43</sup> Nevertheless no such limitation is found in the language of the law, and it may be significant that the final resolution omitted the provision in the House bill to the effect that any proclamation issued by the President under this section should apply equally to all belligerents.<sup>44</sup>

#### THE NEUTRALITY ACT AND TREATY OBLIGATIONS

The United States is party to a number of multilateral agreements which may be affected by the Neutrality Act. The most obvious case of conflict arises between the Convention of Rights and Duties of States in the Event of Civil Strife, adopted at Havana on February 20, 1928—a treaty

36. Senator Pittman argued, however, that this part of the Act was "practically mandatory." *Congressional Record*, March 1, 1937, p. 2089.

37. *Congressional Record*, April 29, 1937, p. 5147; also *ibid.*, March 1, 1937, p. 2091.

38. *Ibid.*, April 29, 1937, p. 5147.

39. *Ibid.*, March 1, 1937, p. 2099. Senator Bone also declared: "We know full well that this resolution is designed to protect war trade." *Ibid.*, April 29, 1937, p. 5155.

40. It is a matter of interpretation whether the President may put into effect the prohibition affecting American vessels, without also putting into effect the divesting of title provisions, and vice versa.

41. Cf. Constantin Vulcan, "La Neutralité des Etats-Unis," to appear shortly in the *Revue de Droit International Public*.

42. Cf. Senator Brown, *Congressional Record*, March 3, 1937, p. 2253; Mr. McReynolds, *ibid.*, April 29, 1937, p. 5177; *ibid.*, March 12, 1937, p. 2770.

43. *Ibid.*, April 29, 1937, p. 5159.

44. Sec. 4(e) S.J.Res. 51 as amended by the House. Senate Document No. 40, 75th Congress, 1st session.



ratified by the United States on May 21, 1930. Under this treaty American governments in the event of civil strife are obliged "to forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized . . . ." But under the Neutrality Act, the arms embargo, if applied in the event of civil strife, must apply equally to government and rebels. Under the Havana convention the United States has an obligation to impose an arms embargo upon the rebels alone, but under the Neutrality Act the President apparently cannot impose an arms embargo unless it applies equally to both the rebels and the government concerned.<sup>44a</sup>

The United States is also party to a number of multilateral pacts affecting the Americas, such as the Argentine Anti-War Pact of 1933, the Montevideo Convention on the Rights and Duties of States of December 26, 1933, and the Buenos Aires "consultation" conventions of December 23, 1936.<sup>45</sup> These conventions impose obligations in which the signatories: (1) "condemn" aggressive war or intervention in the affairs of another state; (2) promise that the settlement of disputes "of any kind" shall be effected only by pacific means; (3) agree to "consult" with each other, and to "adopt in their character as neutrals a common and solidary attitude" in the event of hostilities, or in order to prevent the spread of hostilities.<sup>46</sup>

So far as the Orient is concerned, the United States is party to the Nine-Power Agreement of February 6, 1922, which obliges the signatories (other than China) to respect the sovereignty, independence and the territorial and administrative integrity of China. While no power guarantees that these obligations shall not be violated, Article VII of the Convention provides that "whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present treaty and renders desirable discussion of such application, there shall be full and frank communication between the contracting powers concerned." This article thus seems to impose the obligation of some kind of consultation if any of the parties desires it.<sup>47</sup>

44a. The President could recognize rebel belligerency, but such action would give impetus to revolutionary movements.

45. U. S. Treaty Series, No. 906; *ibid.*, No. 881. Also Charles G. Fenwick, "The Buenos Aires Conference, 1936," *Foreign Policy Reports*, July 1, 1937.

46. The Argentine Anti-War Pact envisaged the application of political, juridical or economic sanctions authorized by international law, in the event of non-execution of contractual engagements, *Pacte de Non-Agression et de Conciliation Argentin*. Ministère des Affaires Étrangères de la République Argentine, Buenos Aires, 1936, p. 312.

The purpose of consultation presumably is to effect peaceful settlement by mediation; but if the United States applied its Neutrality Act without previous consultation, it would formally announce the existence of war, thus putting an end to mediation and injuring the objective of the "consultative" conventions to which it is a party. It is possible, therefore, to contend that the application of the Neutrality Act, without previous consultation, might conflict with the treaty obligations of the United States.

A more difficult question arises should the United States impose an arms and financial embargo equally upon all belligerents, following the failure of consultation. The treaties embodying the duty of consultation also lay down certain substantive principles, such as condemning "aggressive" war, and the United States has an obligation not to support, or encourage, their violation. In time of peace, for example, China may freely purchase arms in the United States, but when it becomes the victim of a Japanese war of aggression violating the Nine-Power Treaty, China, like Japan, loses the right to buy arms in this country. Under the pre-war rules of neutrality, China was responsible for determining whether it could import foreign arms in defiance of a Japanese blockade. Under the 1937 neutrality law, the United States accepts responsibility for barring both China and Japan from this market. Since the material consequences of this Act may be much more damaging to China than to Japan, it may be argued that the Neutrality Act, in imposing a penalty on China at the very time when it is the victim of aggressive war, undermines the Nine-Power Treaty. A similar contention may be advanced with respect to the Inter-American Conventions.<sup>48</sup>

Under constitutional law, the American Congress has the power to enact legislation vio-

47. The other multilateral pact which may be affected by the Neutrality Act is the Kellogg-Briand pact of August 26, 1928, in which the parties "renounce war as an instrument of national policy" and agree that the settlement of disputes "shall never be sought except by pacific means." This phraseology is so vague, and each power has so much latitude in interpreting the meaning of the pact, that it is doubtful whether it can be argued that its obligations conflict with the neutrality resolution of May 1, 1937.

48. One escape from this dilemma would be to prohibit the peace time export of munitions to all countries. Senator Nye advanced such a proposal in 1937, making an exception for nations on the American continents engaged in war against a non-American state. S.J.Res. 120, 75th Congress, 1st session. Article 6 of the Buenos Aires convention of 1936, however, authorizes the parties to consider arms embargoes "in accordance with the municipal legislation of the parties and without detriment to other obligations." Even this language does not make it clear whether an embargo against a victim of aggression "is without detriment to other obligations."

lating treaty obligations of the United States.<sup>49</sup> The exercise of this power, however, may constitute a violation of the international obligation.

#### THE NEUTRALITY ACT AND AMERICAN POLITICAL INTERESTS

The intent of the authors of the Neutrality Act was to remove the type of disputes between the United States and other powers which might lead to war. The theory was that this object could be attained by sacrificing certain rights and interests of the United States, such as the right of belligerent trade. But the imposition of an embargo may in itself injure a belligerent and thus produce a dispute which otherwise would not exist.

Moreover, in imposing on the President the responsibility of determining whether a "state of war" has come into existence, the Neutrality Act requires the administration to pronounce a judgment which may have serious consequences. Japan, for example, does not admit that its present hostilities in China constitute war; China has not declared war, nor has either party broken off diplomatic relations with the other. Should the President of the United States take it upon himself to declare that hostilities in the Far East constitute a "state of war," either Japan or China might be offended, and Japan might feel encouraged to resort to more drastic measures—in the legal sense—such as declaring war, which would injure both Chinese and American interests. An American pronouncement that Japan and China are at war, when Japanese troops are operating on Chinese soil, might also be regarded by world opinion as a declaration that Japan is the aggressor.

In October 1935 President Roosevelt issued a proclamation declaring that a state of war existed between Ethiopia and Italy, at least five days before diplomatic relations between the two countries had been suspended, and in the absence of a

declaration of war by Italy.<sup>50</sup> In issuing his proclamation, the President stated: "We are now compelled to recognize the simple and indisputable fact that Ethiopia and the Italian forces are engaged in combat, thus creating a state of war within the intent and meaning of the joint resolution."<sup>51</sup> Despite the existence of hostilities even more widespread than in Ethiopia, the President failed to issue a similar proclamation in the case of the Orient where hostilities began on July 7. In the absence of a declaration of war or the severance of diplomatic relations by one of the two belligerents, the President legally seemed to be within his rights in failing to issue a proclamation that a state of war existed, despite the Ethiopian precedent. His failure to apply the Act seemed to be inspired largely by a desire to do nothing which would aggravate the controversy between Japan and China, injure the progress of the evacuation of American nationals from war zones, pronounce a judgment on Japan which might react unfavorably on the United States,<sup>52</sup> or impose unnecessary sacrifices on American economic interests.

It is contended that the American government could safely apply the arms embargo against Italy and Ethiopia in October 1935 because it was public knowledge that the League Council was on the point of adopting stronger measures; also, the United States could apply an arms embargo to Spain in January 1937 because a similar policy had been adopted by the twenty-seven powers constituting the Non-Intervention Committee in London. In the Orient, however, no collective action was taken up to October 1937 and, in its absence, application by the United States of a unilateral embargo following a proclamation that a state of war existed might create more dangers than it would avoid. Moreover, the unilateral application of cash-and-carry provisions might merely mean the diversion of American business to foreigners; but if these provisions were applied in cooperation with other powers, this diversion would not take place. Should either party, however, declare war or break off diplomatic relations, the President would be obliged to issue the proclamation provided for in the Act, even though the political and economic interests of the United States would be adversely affected.

To understand the effect of the neutrality reso-

49. *Chinese Exclusion Cases* (1889), 130 U. S. 581; C. K. Burdick, *The Law of the American Constitution* (1922), p. 73. The question is also raised whether the embargoes provided by the neutrality resolution conform to the obligations arising out of the commercial treaties to which the United States is a party, such as the treaty with Italy of February 28, 1871. To remove any doubts, the draft neutrality resolution of January 1936 (section 16a, S. 3473) authorized the President, if he finds that the Act would contravene treaty provisions with any foreign country, to negotiate for the purpose of modifying such provisions, or even give notice of terminating the treaty. The 1937 neutrality resolution does not contain such a provision, but the reciprocity agreements being negotiated by the State Department expressly authorize the imposition of arms embargoes. Art. XIV, Agreement of February 19, 1937 with El Salvador. For the Pittman-McReynolds proposed amendment to the Neutrality Act, reconciling it with the Inter-American Conventions, cf. p. 177.

50. On October 7, 1935, however, the League Council declared that the Italian government had resorted to war. League of Nations, *Official Journal*, November 1935, p. 1223.

51. Buell, "The New American Neutrality," cited.

52. Cf. Senator Pittman's statement, *New York Times*, July 30, 1937.

lution on other political interests of the United States, it is necessary to consider the application of the Act in the event of hypothetical wars in various parts of the world. In the event of a general European war, involving Britain, France and the Soviet Union on one side, and Germany and Italy on the other, the application of the Neutrality Act would probably work against the "Fascist dictatorships." The application of the munitions embargo would be of little consequence, since all of these nations are now virtually self-sufficient in the production of war implements; but most of them need raw materials. The American market will remain open to all belligerents for such materials on a cash-and-carry basis; but since Britain, France and the Soviet Union have superior sea power and merchant marines, control vast gold supplies and reserves, and already have large holdings in the United States,<sup>53</sup> they could profit from the cash-and-carry provisions of the neutrality law, unlike the Fascist dictatorships, which do not have the necessary financial resources, or lack the merchant marines or navies to transport American materials.

As far as war in the Pacific is concerned, it is argued that application of the Neutrality Act would assist Japan. Since Japan is virtually self-sufficient in munitions production, it would not be adversely affected by the arms embargo, in contrast to China which, dependent largely on outside supplies, might be severely injured. On the other hand, Japan by virtue of superior sea power, could take advantage of the cash-and-carry provisions in the American Neutrality Act to continue to buy important raw materials, provided it could pay for them. It is for this reason that some Senators declare the Neutrality Act makes the United States an ally of Britain and Japan.<sup>54</sup> On the other hand, it is contended that, whether the Act is applied or not, a Japanese blockade would prevent imports from reaching China: therefore, application of the Neutrality Act in fact would not injure China but interrupt purchases by Japan of American planes and other war implements, which in 1936

amounted to more than a million dollars.<sup>55</sup> It is also argued that Japan is not likely to develop a large war trade in materials other than war implements, first because it lacks large gold reserves and other assets, and second because it has an inadequate merchant marine. Only a third of the trade (in value) between the United States and Japan is transported in Japanese vessels.<sup>56</sup> Moreover, part of the Japanese merchant marine was diverted to transport purposes following the outbreak of hostilities with China. Consequently, should the President prohibit American vessels from carrying war materials, the result might be injurious to Japan unless it could requisition vessels from other countries. For these various reasons, it is doubtful whether Japan would be able to profit as much from the Neutrality Act as Britain or France could in a European war.<sup>57</sup>

In reply to these arguments, critics assert that, while undoubtedly a Japanese blockade of the Chinese coast might be effective, some vessels could always evade it. Moreover, should war be prolonged, China, in the absence of the Neutrality Act, might be able to import arms from the United States via European Russia, transporting them by truck across Mongolia to Lake Baikal; or via Indo-China where rail connects French ports with Yunnan. Such possibilities, however, cannot be explored if the Act is applied, and it is therefore argued that Japan is favored by the Act.

#### THE NEUTRALITY ACT AND THE WESTERN HEMISPHERE

As far as the Western Hemisphere is concerned, the Neutrality Act involves the possibility of war between two American states; and war between an American and a non-American state. Moreover, the President has discretion to apply it in the event of civil strife.

Should Paraguay, for example, again declare war on Bolivia, the League of Nations or the states of the Western Hemisphere, after "consulting" together, might find that Paraguay was the aggressor. Members of the League would then apply the embargo only against Paraguay, although the United States would have to apply it to both parties. Under such circumstances, Bolivia could purchase arms in Europe, but at greater cost and delay than in the United States. Its inability to obtain arms from the United States might thus

53. Today there is enough foreign capital in the United States—about \$7,700,000,000—to finance as large a war trade as developed between 1914 and 1917 despite the prohibition against foreign lending, and omitting from consideration the President's power to authorize short-term credits. The total exports from the United States to Britain and France from August 1, 1914 to April 1, 1917 were only \$5,653,419,000; and the total to all the allies was only a little over seven billion. Cf. statement submitted by J. P. Morgan & Co. to the Special Committee of the United States Senate Investigating the Munitions Industry, January 7, 1936. Much of the 1914-1917 trade was done on a cash-and-carry basis. Cf. Mrs. Rogers, *Congressional Record*, March 16, 1937, pp. 2922, 2928.

54. Senator Hiram Johnson, *Congressional Record*, March 3, 1937, p. 2235; Senator Gerry, *ibid.*, p. 2255.

55. Cf. *Annual Report of National Munitions Control Board* for the year ending November 30, 1936, 75th Congress, 1st session, cited.

56. *New York Times*, August 19, 1937.

57. Cf. W. W. Lockwood, "U. S. Neutrality in the Far East," *Amerasia*, April 1937.



be a decisive factor in causing Bolivia to lose the war.

As far as a war between an American and a non-American state is concerned, section 4 of the neutrality law reads as follows: "This Act shall not apply to an American republic or republics engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war." Senator Robinson, in debate, admitted that this provision was "not entirely neutral" but was necessary unless the Monroe Doctrine was to be abandoned.<sup>58-59</sup> For example, if Brazil finds itself at war with Germany, the President could not apply the arms embargo against Brazil, although he would have to apply it against Germany. As far as this type of war is concerned, the President must discriminate against a European aggressor. But Brazil would lose the benefit of being exempt from the embargo if it were allied or associated with some non-American power, such as France. It is not clear from the wording of the law whether a Latin American state benefiting from the application of League sanctions would receive the exemptions of the article.

In case Argentina and Chile became involved in hostilities, each supported by a European power, the President would be obliged to apply the Neutrality Act to all belligerents, although the outcome of the struggle might vitally affect the interests of the United States.<sup>60</sup> As a final alternative, the United States could go to war to defend the Monroe Doctrine and its other interests; but critics assert that this drastic solution might be avoided if the United States would allow the export of arms and the lending of money to those Latin-American belligerents fighting in self-defense.

In the event of "civil strife" in Latin America or elsewhere, the President at his discretion may impose an arms embargo; but if he exercises this discretion, he must impose the embargo against the government as well as the rebels. This policy marks a departure from the arms embargo often followed in the past by the United States with respect to Latin America. Under statutes enacted in 1912 and 1922, the President could impose an arms embargo on any American or other country in which the United States exercised extraterritorial jurisdiction if conditions of domestic violence existed, subject to such exceptions and limitations as

he desired to make. Under this authority, the United States consistently prohibited the export of munitions to rebels in Latin-American countries, while allowing shipments to constituted governments. The purpose of this policy was in part to discourage revolutions.<sup>61</sup>

The Act of May 1937 apparently marks a departure from this policy. From the point of view of American interests, the question is raised whether it is wise, wholly apart from treaty obligations, for the United States to impose an embargo equally on a recognized government and on revolutionists. It is contended that such a policy gives encouragement to rebellion. In the future it is not impossible that outside influences may instigate or give support to revolution in Latin America as they have in Spain. Under the Neutrality Act, however, the President cannot consider the nature of such influences in applying the arms embargo.

Supporters of the Neutrality Act insist that the question whether the Act will injure one belligerent more than another is immaterial, so long as the policy of the United States is made known to the world in time of peace. The object of the Act, they insist, is to advance the national interest of the United States, which is to keep the country out of war.

Critics reply that, except for the arms and loan embargo, the Act does not proclaim the policy of the United States in time of peace, and serious controversy may arise should the President unilaterally attempt to determine whether a "state of war" has come into existence, or employ his discretion during wartime to apply cash-and-carry. Moreover, these critics insist that an act which operates to assist Britain and France in a European war, or Japan in a war with the Orient, regardless of the causes or circumstances of that war, or which operates to undermine the Monroe Doctrine and constitutional government in Latin America, does not really advance the interests of the United States.

According to some critics, the sacrifice of political interests such as the Open Door and the Monroe Doctrine might be justified if the result were

58-59. *Congressional Record*, February 18, 1936, p. 2347.

60. Cf. remarks of Senator Gerry, *Congressional Record*, March 1, 1937, p. 2106. Moreover, the United States may not apply the arms embargo to an American republic, even if it is an aggressor, in a war with a non-American power. Cf. Senator King, *ibid.*, February 18, 1936, p. 2347.

61. There were one or two exceptions. President Wilson, in February 1914, permitted the unrestricted export of arms to Mexico, desiring the removal of the Huerta government. Cf. Benjamin H. Williams, *Economic Foreign Policy of the United States* (New York, McGraw-Hill, 1929), pp. 146ff. Presidential proclamations today forbid the export of arms to Honduras, Nicaragua and Cuba—as well as China—except when the government of these countries has informed the United States that it has authorized a given import. U.S., State Department, *International Traffic in Arms* (Washington, Government Printing Office, 1937; 4th ed.), p. 23.



really to keep the United States out of war. But they insist that abandonment of traditional policies, out of fear of aggression, will merely increase the danger of an eventual attack on the United States. In attempting to exempt American republics from the operation of the Act, Congress seemed partially aware of this danger.

In an apparent effort to remove the remaining inconsistencies between the Neutrality Act and the Latin American policy of the present administration, Senator Pittman and Judge McReynolds introduced an amendment to the Neutrality Act in July 1937 which provided that its embargo and cash-and-carry provisions should not apply to the American republics "unless the President shall find, after consultation with the governments of other American republics and after consideration of all the circumstances," that application of the Neutrality Act would "tend toward the re-establishment of peace or the protection of the commercial or other interests of the United States." Moreover, any Presidential proclamation involving the Act should apply to the "country or countries named therein, subject to such limitations and exceptions as he may prescribe."<sup>62</sup> Such an amendment, limited to the American republics, expressly authorizes "consultation" before the imposition of any embargoes, and in the application of embargoes the President is given virtually complete discretion.

Somewhat earlier, Senator Thomas of Utah had proposed a more conservative means of reconciling the Neutrality Act with the principle of consultation and collective action generally. His proposed resolution provided that "in any case where the United States is a party to an international agreement or treaty calling for joint neutral action or consultation before action, the President shall communicate with the countries party to such agreement or treaty prior to the issuance of a proclamation provided for by this joint resolution"; but he should notify all countries that "the neutrality of the United States will be impartially enforced against all countries and factions participating in such war or civil strife."<sup>63</sup>

This proposal might enable the United States and other powers jointly to determine whether a "state of war" existed, and might effect a recon-

ciliation between the League conception of sanctions against an aggressor and the American "neutrality" conception of an arms embargo against all belligerents equally. Thus, in the Italian-Ethiopian dispute, the United States applied the arms embargo to both parties, but Ethiopia did not suffer since, unlike Italy, it could obtain arms from League members. Similarly, in the Orient, it would be possible for League members to apply an arms and shipping embargo against Japan—leaving China, the victim of aggression, free to import from European markets—while the United States would forbid the export of arms both to China and Japan, at the same time prohibiting American vessels from carrying any materials to either belligerent.<sup>63a</sup> Since Japan does not have a sufficient number of ships for its carrying trade and since, in the presence of a League shipping embargo, it could not obtain foreign shipping, this type of cooperation between the League and the American shipping embargo might offset the damage which an American arms embargo would do to China. More important, collective action of this sort would protect the United States from assuming responsibilities alone in the Orient, and tend to shorten a war which might otherwise rapidly spread to the rest of the world.

By the time of adjournment in August 1937, Congress had failed to adopt any of these new proposals; but even in the absence of express Congressional authorization, it would seem that the President has the authority to "consult" with other powers before issuing a proclamation announcing the existence of a "state of war."<sup>64</sup>

Although the Neutrality Act does not, therefore, represent a complete barrier to cooperative measures, and although it gives the President wide discretion in imposing cash-and-carry, the automatic provisions relative to the arms and financial embargo obviously hamper Presidential discretion in protecting what he considers to be the interests of the United States and in cooperating with other powers to avert the outbreak of war.

63a. Subsequently the President could lift the embargo against China. Cf. p. 172.

64. The Senate gave approval to the Buenos Aires conventions, imposing the obligation of consultation, on June 29, 1937. Since the convention was approved after the passage of the neutrality law, its obligations are superior to those in the Neutrality Act in case of conflict.

62. S.J.Res. 175; H.J.Res. 439, 75th Congress, 1st session.

63. Section 8, S.J.Res. 47.

## APPENDIX

## THE NEUTRALITY ACT

Adopted by Congress, April 29, 1937  
(PUBLIC RESOLUTION—No. 27—75TH CONGRESS)  
(CHAPTER 146—1ST SESSION)  
(S. J. Res. 51)

EXPORT OF ARMS, AMMUNITION,  
AND IMPLEMENTS OF WAR

Section 1. (a) Whenever the President shall find that there exists a state of war between, or among, two or more foreign States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to any belligerent State named in such proclamation, or to any neutral State for transshipment to, or for the use of, any such belligerent State.

(b) The President shall, from time to time, by proclamation extend such embargo upon the export of arms, ammunition, or implements of war to other States as and when they may become involved in such war.

(c) Whenever the President shall find that a state of civil strife exists in a foreign State and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign State would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign State, or to any neutral State for transshipment to, or for the use of, such foreign State.

(d) The President shall, from time to time by proclamation, definitely enumerate the arms, ammunition, and implements of war, the export of which is prohibited by this section. The arms, ammunition, and implements of war so enumerated shall include those enumerated in the President's proclamation numbered 2163, of April 10, 1936, but shall not include raw materials or any other articles or materials not of the same general character as those enumerated in the said proclamation, and in the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, signed at Geneva, June 17, 1925.

(e) Whoever, in violation of any of the provisions of this Act, shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States shall be fined not more than \$10,000, or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8, inclusive, title 6, chapter 30, of the Act approved June 15, 1917 (40 Stat. 223-225; U. S. C., 1934 ed., title 22, secs. 238-245).

(f) In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act, no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States.

(g) Whenever, in the judgment of the President, the conditions which have caused him to issue any proclamation under the authority of this section have ceased to exist, he shall revoke the same, and the provisions of this section shall thereupon cease to apply with respect to the State or States named in such proclamation, except with respect to offenses committed, or forfeitures incurred, prior to such revocation.

## EXPORT OF OTHER ARTICLES AND MATERIALS

Sec. 2. (a) Whenever the President shall have issued a proclamation under the authority of section 1 of this Act and he shall thereafter find that the placing of restrictions on the shipment of certain articles or materials in addition to arms, ammunition, and implements of war from the United States to belligerent States, or to a State wherein civil strife exists, is necessary to promote the security or preserve the peace of the

United States or to protect the lives of citizens of the United States, he shall so proclaim, and it shall thereafter be unlawful, except under such limitations and exceptions as the President may prescribe as to lakes, rivers, and inland waters bordering on the United States, and as to transportation on or over lands bordering on the United States, for any American vessel to carry such articles or materials to any belligerent State, or to any State wherein civil strife exists, named in such proclamation issued under the authority of section 1 of this Act, or to any neutral State for transshipment to, or for the use of, any such belligerent State or any such State wherein civil strife exists. The President shall by proclamation from time to time definitely enumerate the articles and materials which it shall be unlawful for American vessels to so transport.

(b) Whenever the President shall have issued a proclamation under the authority of section 1 of this Act and he shall thereafter find that the placing of restrictions on the export of articles or materials from the United States to belligerent States, or to a State wherein civil strife exists, is necessary to promote the security or preserve the peace of the United States or to protect the lives or commerce of citizens of the United States, he shall so proclaim, and it shall thereafter be unlawful, except under such limitations and exceptions as the President may prescribe as to lakes, rivers, and inland waters bordering on the United States, and as to transportation on or over land bordering on the United States, to export or transport, or attempt to export or transport or cause to be exported or transported, from the United States to any belligerent State, or to any State wherein civil strife exists, named in such proclamation issued under the authority of section 1 of this Act, or to any neutral State for transshipment to, or for the use of, any such belligerent State or any such State wherein civil strife exists, any articles or materials whatever until all right, title, and interest therein shall have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national. The shipper of such articles or materials shall be required to file with the collector of the port from which they are to be exported a declaration under oath that there exists in citizens of the United States no right, title, or interest in such articles or materials, and to comply with such rules and regulations as shall be promulgated from time to time by the President. Any such declaration so filed shall be a conclusive estoppel against any claim of any citizen of the United States of right, title, or interest in such articles or materials. Insurance written by underwriters on any articles or materials the export of which is prohibited by this Act, or on articles or materials carried by an American vessel in violation of subsection (a) of this section, shall not be deemed an American interest therein, and no insurance policy issued on such articles or materials and no loss incurred thereunder or by the owner of the vessel carrying the same shall be made a basis of any claim put forward by the Government of the United States.

(c) The President shall from time to time by proclamation extend such restrictions as are imposed under the authority of this section to other States as and when they may be declared to become belligerent States under proclamations issued under the authority of section 1 of this Act.

(d) The President may from time to time change, modify, or revoke in whole or in part any proclamations issued by him under the authority of this section.

(e) Except with respect to offenses committed, or forfeitures incurred, prior to May 1, 1939, this section and all proclamations issued thereunder shall not be effective after May 1, 1939.

## FINANCIAL TRANSACTIONS

Sec. 3. (a) Whenever the President shall have issued a proclamation under the authority of section 1 of this Act, it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any belligerent State or of any State wherein civil strife exists, named in such proclamation, or of any political subdivision of any such State, or of any person acting for or on behalf of the government of any such State,

or of any faction or asserted government within any such State wherein civil strife exists, or of any person acting for or on behalf of any faction or asserted government within any such State wherein civil strife exists, issued after the date of such proclamation, or to make any loan or extend any credit to any such government, political subdivision, faction, asserted government, or person, or to solicit or receive any contribution for any such government, political subdivision, faction, asserted government, or person: *Provided*, That if the President shall find that such action will serve to protect the commercial or other interests of the United States or its citizens, he may, in his discretion, and to such extent and under such regulations as he may prescribe, except from the operation of this section ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peacetime commercial transactions. Nothing in this subsection shall be construed to prohibit the solicitation or collection of funds to be used for medical aid and assistance, or for food and clothing to relieve human suffering, when such solicitation or collection of funds is made on behalf of and for use by any person or organization which is not acting for or on behalf of any such government, political subdivision, faction, or asserted government, but all such solicitations and collections of funds shall be subject to the approval of the President and shall be made under such rules and regulations as he shall prescribe.

(b) The provisions of this section shall not apply to a renewal or adjustment of such indebtedness as may exist on the date of the President's proclamation.

(c) Whoever shall violate the provisions of this section or of any regulations issued hereunder shall, upon conviction thereof, be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the violation be by a corporation, organization, or association, each officer or agent thereof participating in the violation may be liable to the penalty herein prescribed.

(d) Whenever the President shall have revoked any such proclamation issued under the authority of section 1 of this Act, the provisions of this section and of any regulations issued by the President hereunder shall thereupon cease to apply with respect to the State or States named in such proclamation, except with respect to offenses committed prior to such revocation.

#### EXCEPTIONS—AMERICAN REPUBLICS

Sec. 4. This Act shall not apply to an American republic or republics engaged in war against a non-American State or States, provided the American republic is not cooperating with a non-American State or States in such war.

#### NATIONAL MUNITIONS CONTROL BOARD

Sec. 5. (a) There is hereby established a National Munitions Control Board (hereinafter referred to as the "Board") to carry out the provisions of this Act. The Board shall consist of the Secretary of State, who shall be chairman and executive officer of the Board, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce. Except as otherwise provided in this Act, or by other law, the administration of this Act is vested in the Department of State. The Secretary of State shall promulgate such rules and regulations with regard to the enforcement of this section as he may deem necessary to carry out its provisions. The Board shall be convened by the chairman and shall hold at least one meeting a year.

(b) Every person who engages in the business of manufacturing, exporting, or importing any of the arms, ammunition, or implements of war referred to in this Act, whether as an exporter, importer, manufacturer, or dealer, shall register with the Secretary of State his name, or business name, principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war which he manufactures, imports, or exports.

(c) Every person required to register under this section shall notify the Secretary of State of any change in the arms, ammunition, or implements of war which he exports, imports, or manufactures; and upon such notification the Secretary of State shall issue to such person an amended certificate of registration,

free of charge, which shall remain valid until the date of expiration of the original certificate. Every person required to register under the provisions of this section shall pay a registration fee of \$500, unless he manufactured, exported, or imported arms, ammunition, and implements of war to a total sales value of less than \$50,000 during the twelve months immediately preceding his registration, in which case he shall pay a registration fee of \$100. Upon receipt of the required registration fee, the Secretary of State shall issue a registration certificate valid for five years, which shall be renewable for further periods of five years upon the payment for each renewal of a fee of \$500 in the case of persons who manufactured, exported, or imported arms, ammunition, and implements of war to a total sales value of more than \$50,000 during the twelve months immediately preceding the renewal, or a fee of \$100 in the case of persons who manufactured, exported, or imported arms, ammunition, and implements of war to a total sales value of less than \$50,000 during the twelve months immediately preceding the renewal. The Secretary of the Treasury is hereby directed to refund, out of any moneys in the Treasury not otherwise appropriated, the sum of \$400 to every person who shall have paid a registration fee of \$500 pursuant to this Act, who manufactured, exported, or imported arms, ammunition, and implements of war to a total sales value of less than \$50,000 during the twelve months immediately preceding his registration.

(d) It shall be unlawful for any person to export, or attempt to export, from the United States to any other State, any of the arms, ammunition, or implements of war referred to in this Act, or to import, or attempt to import, to the United States from any other State, any of the arms, ammunition, or implements of war referred to in this Act, without first having obtained a license therefor.

(e) All persons required to register under this section shall maintain, subject to the inspection of the Secretary of State, or any person or persons designated by him, such permanent records of manufacture for export, importation, and exportation of arms, ammunition, and implements of war as the Secretary of State shall prescribe.

(f) Licenses shall be issued to persons who have registered as herein provided for, except in cases of export or import licenses where the export of arms, ammunition, or implements of war would be in violation of this Act or any other law of the United States, or of a treaty to which the United States is a party, in which cases such licenses shall not be issued.

(g) Whenever the President shall have issued a proclamation under the authority of section 1 of this Act, all licenses theretofore issued under this Act shall *ipso facto* and immediately upon the issuance of such proclamation, cease to grant authority to export arms, ammunition, or implements of war from any place in the United States to any belligerent State, or to any State wherein civil strife exists, named in such proclamation, or to any neutral State for transshipment to, or for the use of, any such belligerent State or any such State wherein civil strife exists; and said licenses, in so far as the grant of authority to export to the State or States named in such proclamation is concerned, shall be null and void.

(h) No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this Act.

(i) The provisions of the Act of August 29, 1916, relating to the sale of ordnance and stores to the Government of Cuba (39 Stat. 619, 643; U. S. C., 1934 ed., title 50, sec. 72), are hereby repealed as of December 31, 1937.

(j) The Board shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain such information and data collected by the Board as may be considered of value in the determination of questions connected with the control of trade in arms, ammunition, and implements of war. The Board shall include in such reports a list of all persons required to register under the provisions of this Act, and full information concerning the licenses issued hereunder.

(k) The President is hereby authorized to proclaim upon



recommendation of the Board from time to time a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section.

#### AMERICAN VESSELS PROHIBITED FROM CARRYING ARMS TO BELLIGERENT STATES

Sec. 6. (a) Whenever the President shall have issued a proclamation under the authority of section I of this Act, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel to carry any arms, ammunition, or implements of war to any belligerent State, or to any State wherein civil strife exists, named in such proclamation, or to any neutral State for transshipment to, or for the use of, any such belligerent State or any such State wherein civil strife exists.

(b) Whoever, in violation of the provisions of this section, shall take, or attempt to take, or shall authorize, hire, or solicit another to take, any American vessel carrying such cargo out of port or from the jurisdiction of the United States shall be fined not more than \$10,000, or imprisoned not more than five years, or both; and in addition, such vessel, and her tackle, apparel, furniture, and equipment, and the arms, ammunition, and implements of war on board, shall be forfeited to the United States.

#### USE OF AMERICAN PORTS AS BASE OF SUPPLY

Sec. 7. (a) Whenever, during any war in which the United States is neutral, the President, or any person thereunto authorized by him, shall have cause to believe that any vessel, domestic or foreign, whether requiring clearance or not, is about to carry out of a port of the United States, fuel, men, arms, ammunition, implements of war, or other supplies to any warship, tender, or supply ship of a belligerent State, but the evidence is not deemed sufficient to justify forbidding the departure of the vessel as provided for by section I, title V, chapter 30, of the Act approved June 15, 1917 (40 Stat. 217, 221; U.S.C., 1934 ed., title 18, sec. 31), and if, in the President's judgment, such action will serve to maintain peace between the United States and foreign States, or to protect the commercial interests of the United States and its citizens, or to promote the security or neutrality of the United States, he shall have the power and it shall be his duty to require the owner, master, or person in command thereof, before departing from a port of the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that the vessel will not deliver the men, or any part of the cargo, to any warship, tender, or supply ship of a belligerent State.

(b) If the President, or any person thereunto authorized by him, shall find that a vessel, domestic or foreign, in a port of the United States, has previously cleared from a port of the United States during such war and delivered its cargo or any part thereof to a warship, tender, or supply ship of a belligerent State, he may prohibit the departure of such vessel during the duration of the war.

#### SUBMARINES AND ARMED MERCHANT VESSELS

Sec. 8. Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign State, will serve to maintain peace between the United States and foreign States, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply.

#### TRAVEL ON VESSELS OF BELLIGERENT STATES

Sec. 9. Whenever the President shall have issued a proclamation under the authority of section I of this Act it shall thereafter be unlawful for any citizen of the United States to travel on any vessel of the State or States named in such proclamation,

except in accordance with such rules and regulations as the President shall prescribe: *Provided, however,* That the provisions of this section shall not apply to a citizen of the United States traveling on a vessel whose voyage was begun in advance of the date of the President's proclamation, and who had no opportunity to discontinue his voyage after that date: *And provided further,* That they shall not apply under ninety days after the date of the President's proclamation to a citizen of the United States returning from a foreign State to the United States. Whenever, in the President's judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply with respect to the State or States named in such proclamation, except with respect to offenses committed prior to such revocation.

#### ARMING OF AMERICAN MERCHANT VESSELS PROHIBITED

Sec. 10. Whenever the President shall have issued a proclamation under the authority of section I, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel engaged in commerce with any belligerent State, or any State wherein civil strife exists, named in such proclamation, to be armed or to carry any armament, arms, ammunition, or implements of war, except small arms and ammunition therefor which the President may deem necessary and shall publicly designate for the preservation of discipline aboard such vessels.

#### REGULATIONS

Sec. 11. The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such officer or officers, or agency or agencies, as he shall direct.

#### GENERAL PENALTY PROVISION

Sec. 12. In every case of the violation of any of the provisions of this Act or of any rule or regulation issued pursuant thereto where a specific penalty is not herein provided, such violator or violators, upon conviction, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

#### DEFINITIONS

Sec. 13. For the purposes of this Act—

(a) The term "United States," when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia.

(b) The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

(c) The term "vessel" means every description of watercraft (including aircraft) or other contrivance used, or capable of being used, as a means of transportation on, under, or over water.

(d) The term "American vessel" means any vessel (including aircraft) documented under the laws of the United States.

(e) The term "vehicle" means every description of carriage (including aircraft) or other contrivance used, or capable of being used, as a means of transportation on or over land.

(f) The term "State" shall include nation, government, and country.

#### SEPARABILITY OF PROVISIONS

Sec. 14. If any of the provisions of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

#### APPROPRIATIONS

Sec. 15. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act.

Approved, May 1, 1937, 6:30 p.m., Central Standard Time.